STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

NL VENTURES VI FARMINGTON, LLC,

Appellant/Plaintiff,

v.

CITY OF LIVONIA,

Appellee/Defendant.

_____/

S. Ct. Docket No. _____
COA Docket No. 323144
Circuit Court No. 13-004863-CZ

APPELLEE/PLAINTIFF NL VENTURES VI FARMINGTON, LLC'S APPLICATION FOR LEAVE TO APPEAL

Oral Argument Requested

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT IDENTIFYING THE ORDER APPEALED FROM AND RELIEF SOUGHT

This application for leave to appeal involves the Michigan Court of Appeals' December 22, 2015 published Opinion (the "COA Opinion") (Exhibit 1) in this case.[1]

On June 19, 2014 the Wayne County Circuit Court (the "Circuit Court") issued a final order (the "Circuit Court Order") granting Appellant/Plaintiff NL Ventures VI Farmington, LLC ("Plaintiff") summary disposition on Count I of its Complaint (*Declaratory Judgment Action To Invalidate The Tax Liens*) pursuant to MCR 2.116(I), and denying Defendant/Appellee the City of Livonia ("Defendant") motion for summary disposition as to the remaining counts in the Complaint (Counts II-VI) and dismissing those claims as moot (Exhibit 2).

On December 22, 2015 the Michigan Court of Appeals issued the COA Opinion (i) vacating the Circuit Court Order, (ii) granting Defendant summary disposition on Counts II-VI of the Complaint, and (iii) remanding this matter to the Circuit Court for further proceedings consistent with the COA Opinion.

Plaintiff now timely seeks leave to appeal the COA Opinion to this Court pursuant to MCR 7.302. Plaintiff respectfully requests that this Court (1) grant Plaintiff's application for leave, and (2) reverse the COA Opinion and reinstate and affirm the Circuit Court Order.

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[1] On January 28, 2016 the Michigan Court of Appeals directed that the COA Opinion be published.

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant Plaintiff's application for leave to appeal because the COA Opinion erroneously applied contradictory interpretations of the word "shall" in connection with applying a Michigan statute in conjunction with Defendant's ordinance allowing under certain defined circumstances the placement of unpaid water liens on Plaintiff's ad valorem property tax bills.

Plaintiff Answers: Yes.

Defendant Answers: No.

2. Whether this Court should grant Plaintiff's application for leave to appeal because the COA erroneously granted Defendant summary disposition on Counts II-VI of Plaintiff's Complaint where summary disposition for Defendant was at least premature because there still exists numerous disputed issues of material fact regarding Counts II-VI that first need to be resolved; and discovery has not yet been completed and depositions have not yet been taken.

Plaintiff Answers: Yes.

Defendant Answers: No.

3. Whether this Court should grant Plaintiff's application for leave to appeal because the COA erroneously held that that the factual history of this litigation is not disputed.

Plaintiff Answers: Yes.

Defendant Answers: No.

I. INTRODUCTION

The word "shall" is contained in countless statutes, ordinances and rules in this State. For decades one of the most important rules of statutory construction has been that "shall" conveyed a mandatory requirement that must be followed. This has been true whether "shall" was used by the Legislature, municipalities like Defendant, or other rule making bodies (and even in basic contract interpretation). Furthermore, the word "shall" conveyed a mandatory requirement regardless of whether "shall" was being applied to government units or taxpayers.

Unlike the Circuit Court Order, which correctly and consistently construed "shall" as a mandatory requirement for both parties, the COA Opinion misapplied the word "shall" to be discretionary for the Defendant municipality.

> Similarly, defendant's ordinance, while requiring yearly certification of delinquencies **implies a level of discretion** in the certification because it does not require immediate certification of a delinquency of six months but rather certification of delinquencies that have existed for 'six (6) months or more." [COA Opinion, at 6; bold added].

Thus, the principal issue in this Application is straightforward: under Michigan law what does the word "shall" mean. While it is straightforward and obvious that the word "shall" means mandatory and "must," the COA Opinion reached an answer that is horribly wrong to the detriment of taxpayers, and rendered the use of the word "shall" in Defendant's Ordinance meaningless and a nullity. The resolution of this issue has great critical importance to statutory (and possibly contractual) interpretation in this State.

This lawsuit arises out of the interpretation of Defendant's local water lien ordinance and its use of the word "shall" to establish mandatory requirements that Defendant timely place such water liens on a taxpayer's real property tax bill at a certain time each year. This is a very important issue in this State to taxpayers and taxing jurisdictions because it implicates the time and manner in which unpaid water charges are placed on the tax rolls. Specifically, Defendant's ordinance, section 13.08.350 (the "Ordinance")

(Exhibit 3), unambiguously states that, each year in March, Defendant **shall** timely certify and place unpaid water charges on the tax roll as water liens:

> Charges for water service constitute a lien on the property served, and during March of each year the person or agency charged with the management of the system ***shall*** certify any such charges which as of March 1st of that year have been delinquent six (6) months or more to the city assessor, who ***shall*** enter the same upon the city tax roll of that year against the premises to which such service **shall** have been rendered; and said charges ***shall*** be collected and said lien ***shall*** be enforced in the same manner as provided in respect to taxes assessed upon such roll. [Ordinance 13.08.350(A); emphasis added (Exhibit 3)].

The word "shall" appears five times in the Ordinance. Prior to the COA Opinion, the meaning of the word "shall" was never in dispute, and its use in the Ordinance meant that Defendant **must** certify those charges by March 1st of each year; and after certification, Defendant's assessor **must** timely enter these charges on the tax roll. *See, e.g. Roberts v Mecosta County General Hosp,* 466 Mich 57, 65; 42 NW2d 663 (2002) ("the phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action.") (citation omitted); *Fradco, Inc v Dept of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014) (the word "shall" indicates "a mandatory and imperative directive"); *Smitter v Thornapple Tp*, 494 Mich 121, 137; 833 NW2d 875 (2013) ("The Legislature's use of the word 'shall' generally indicates a mandatory directive, not a discretionary act."); *Ross v Michigan Dep't of Treasury*, 255 Mich App 51, 58; 662 NW2d 36 (2003) (the word "shall" indicates a mandatory duty); *Kenefick v Battle Creek*, 284 Mich App 653, 657; 774 NW2d 925 (2009) ("The word 'shall' indicates mandatory conduct") (citation omitted).

Here, it is undisputed that for the years at issue Defendant intentionally failed to follow the "shall" requirements in the Ordinance, including failing to timely certify each year the water charges at issue and place them on the tax rolls. As discussed below, Defendant intentionally failed to follow the Ordinance because at that time Defendant concluded that it was in Defendant's best interest not to do so. As a result,

the Circuit Court Order, applying the unambiguous mandatory language of the Ordinance, correctly held that those water liens had to be removed from Plaintiff's tax bill.

The COA Opinion, however, inexplicably rejected Michigan's long standing meaning of the word "shall" in order to resurrect placing the water liens on Plaintiff's tax bills and absolve Defendant of the Ordinance's obligations. The COA Opinion held that "shall" did not really make the Ordinance's requirements mandatory; that it was somehow a more "reasoned and fair result" to not require Defendant to be obligated to follow those requirements; and Defendant had broad discretion in enforcing the water liens even though the Ordinance says otherwise. *See* COA Opinion, at 6. Thus, the COA Opinion concluded that Defendant's admitted failure to follow the Ordinance was immaterial and excusable, and, as a result, the Ordinance was rendered basically meaningless and a nullity. The COA Opinion holding, however, directly contradicts and ignores the plain and unambiguous language of the Ordinance and established Michigan law with respect to the statutory use and meaning of the word "shall."

More troublesome is that the COA Opinion then contradicted its very own holding and arrived at the exact opposite conclusion as to the word "shall" in another applicable statute, which set forth certain filing requirements for Plaintiff taxpayer. Specifically, the COA Opinion held that, unlike its purported discretionary meaning in the Ordinance, the word "shall" in MCL 141.121(3) made other filing requirements mandatory for Plaintiff; and Plaintiff's failure to follow those other mandatory requirements was terminal to Plaintiff's claims:

> Plaintiff cannot escape the mandatory nature of the requirements delineated in MCL 123.165 through use of the word "shall." MCL 141.121(3), when viewed in conjunction with MCL 123.165, indicates the necessity of an affirmative act by plaintiff to avoid liability. [COA Opinion, at 9].

Put simply, under the COA Opinion, the word "shall" means something entirely different when it is applied to a taxpayer like Plaintiff as opposed to a local government like Defendant. The COA Opinion's

contradictory interpretation and application of the word "shall," cannot be reconciled in any manner that is legitimate or supported by Michigan law. Accordingly, the COA Opinion constitutes bad law and reversible error and, therefore, should be reversed by this Court.

For the reasons set forth herein, Plaintiff respectfully requests that this Court issue an order (1) granting Plaintiff's application for leave to appeal, (2) vacating and reversing the COA Opinion, (3) affirming the Circuit Court Order, (4) awarding Plaintiff costs including attorneys' fees, and (5) awarding Plaintiff any other relief this Court deems necessary and just.

II. CONCISE STATEMET OF FACTS

The COA Opinion conveniently, summarily, and without any further explanation, held in a one line pronouncement that the factual history of this litigation is somehow not disputed. *See* COA Opinion, at 1. The COA Opinion, however, did not actually identify what those undisputed facts actually were.

There are significant disputed facts in this case. Plaintiff disagrees with that COA Opinion conclusion based on, among other things, the record in this case, including Defendant's various pleadings in this matter in which numerous material and vigorous disagreements as to the factual circumstances of this case were identified. However, assuming, *arguendo*, that the COA Opinion is correct, then below is a recitation of the facts as they were set forth by Plaintiff in its Brief on Appeal to the Michigan Court of Appeals and, therefore, such facts apparently now constitute undisputed facts in this case which no longer can be disputed by Defendant. These now purported undisputed facts set forth an intentional scheme by Defendant to not comply with the Ordinance which should not be permitted by this Court.

A. The Subject Property And Plaintiff.

The Subject Property is an industrial building located at 12301 Farmington, Livonia, Michigan. *See* Affidavit of Michael Baucus, at ¶3 (Exhibit 4). For the relevant time period (2009 to 2012), Plaintiff, as landlord, leased the entire Subject Property to Awrey Bakery, LLC ("Awrey"), as tenant (the "Lease"). *See Id.* at ¶4 (Exhibit 4). Awrey operated a large bakery production facility at the Subject Property. *See Id.* at

¶5 (Exhibit 4). Pursuant to the Lease, Awrey – not Plaintiff – was required to pay the monthly water charges for the Subject Property. *See Id.* at ¶4, Lease at §5.02(a) (Exhibit 4).

B. The Unpaid Water Bills.

Beginning in 2009, and unbeknownst to Plaintiff (but known, acquiesced and encouraged by Defendant), Awrey stopped timely paying the water bills for the water that Awrey was using at the Subject Property. **None of this water was ever used by Plaintiff; and it is undisputed that Awrey is responsible for paying for this water**. Until approximately Spring 2012, Plaintiff believed that Awrey was timely paying Defendant the monthly water charges (because, among other reasons, the yearly tax bills from Defendant did not identify any unpaid water charges). *See* Affidavit of Michael Baucus, at ¶8 (Exhibit 4). It is undisputed in the record that had Plaintiff known back in 2009 that Awrey was not paying the water bills, then Plaintiff would have taken steps to ensure payment and stop further unpaid charges from accruing including, if necessary, evicting Awrey from the Subject Property (which Defendant did not want). *See* Affidavit of Michael Baucus, at ¶10 (Exhibit 4).

C. Defendant Enters Into Secret Agreements With Awrey Regarding The Unpaid Water Bills.

Pursuant to Defendant's Ordinance, Section 13.08.350(B), Defendant should have immediately taken the legally required steps to collect on the Unpaid Water Charges (beginning in 2009), including (1) filing a collection suit against Awrey; (2) shutting off and discontinuing the supply of water to Awrey; and (3) each year timely certifying in March the unpaid water and sewer charges and placing them on the tax roll. If the Unpaid Water Charges had been timely placed on the tax roll each year, then Plaintiff would have received each year timely notice of the Unpaid Water Charges via the Subject Property's yearly property tax bills and, therefore, Plaintiff could have, and would have, interceded to resolve this problem.

Defendant, however, did not pursue any of its remedies under Michigan law or follow the Ordinance. **Instead, Defendant intentionally and knowingly did not notify Plaintiff of the nonpayment of the Unpaid Water Charges.** Defendant did not follow Michigan law or the Ordinance

because Defendant did not want to take any negative action against Awrey or Awrey's bank, which could have caused Awrey to cease operations. Importantly, in addition to Awrey being a significant employer in the City of Livonia, it is undisputed that Defendant received other significant financial benefits (both direct and indirect) as a result of Awrey remaining in business, even if Awrey was not paying the Unpaid Water Charges. As Defendant admitted:

> The City has delayed ongoing penalties and interest in recognition of the investment of Awrey in our community and the potential loss of jobs. According to the company, the Livonia plant employs 225 people, with the opportunity to create 150 new manufacturing jobs when operating at full capacity. Awrey indicates its payroll and benefits total $10 million, with annual purchases of $20 million and gross sales of $70.
>
> As a result of Awrey's long history in Livonia as an employer and because of your forecast of significant revenue growth, the City of Livonia is willing [to] enter into this agreement. [January 20, 2012 Letter of Understanding, at 2 (Exhibit 6)].

The decision to extend Awrey credit and not to pursue Awrey for the collection of the Unpaid Water Charges pursuant to Michigan law and/or timely certify and place them on the tax roll each year so that those charges would not appear on Plaintiff's yearly tax bills, was made solely by Defendant – not Plaintiff; and Defendant never once consulted Plaintiff in connection with that decision. It also cannot be disputed that Defendant made this decision based on its own personal interests.

As a result, and unbeknownst to Plaintiff, Defendant and Awrey entered into several agreements (some of which were secret and likely unlawful) designed to allow Awrey to delay paying the Unpaid Water Charges to the detriment of Plaintiff, and continue to use water from Defendant without timely paying for it. For example, on January 20, 2012 Defendant and Awrey entered into a Letter of Understanding which set forth an agreement for the parties to meet and develop a long-term debt retirement plan (Exhibit 6). Similarly, in September 2011 Defendant's Water and Sewer Board granted Awrey a one year extension to

pay without new penalties being charged to the account (although penalties waived during this period would be reinstated if the principal was not paid) (Exhibit 7).

Incredibly, on February 10, 2011 Defendant, Awrey and the Awrey's lending bank (the "Bank") also entered into the Subordination Agreement (Exhibit 8). Among other things, the Subordination Agreement subordinated all of Defendant's debts with Awrey, **including the Unpaid Water Charges**, to the Bank's liens in Awrey's personal property and was "intended to give [the Bank] a priority lien over Awrey's personal property." *See* Defendant's Lawsuit Complaint, at ¶11 (Exhibit 9). The Bank apparently required the Subordination Agreement before it would continue to lend Awrey money or to forbear from enforcing its loan documents with Awrey. As Awrey's Chief Restructuring Officer wrote to Defendant regarding Defendant's later attempts to recover the Unpaid Water Charges against Awrey:

> I have reviewed your letter dated August 13, 2012 to Awrey's CEO, Robert Wallace, outlining certain collection, remedial, and other actions the City of Livonia (the "City") has threatened to take against Awrey **relating to amounts allegedly owed on account of past water and sewer bills** and personal property taxes. I have also reviewed this matter with counsel to Awrey and forwarded your August 13 letter to Awrey's senior lender, Cole Taylor Bank ("Cole Taylor") (which I have also copied on this correspondence).
>
> As you also know, the City entered into that certain Subordination Agreement, dated as of February 10, 2011, by and among the City, Awrey, and Cold Taylor (the "Subordination Agreement."). **That Subordination Agreement specifically prohibits the current and threatened future actions of the City reflected in your August 13 letter, including the restriction on the City taking "Enforcement Actions," as set forth in Section 2.3 of the Subordination Agreement**. [Sept 19, 2012 letter (Exhibit 10)].

The Subordination Agreement – which was a highly unusual agreement for a municipality like Defendant – basically made it impossible for Defendant to collect the Unpaid Water Charges directly from

Awrey because Defendant gave the Bank superior security interests on all of Awrey's assets.[2] **This ensured that the Bank got paid over Defendant and that Defendant would never recover from Awrey**. Again, it cannot be disputed that Defendant entered into these agreements in order to keep Awrey in business because of the significant financial benefits to Defendant. As Defendant's Mayor wrote:

> As you know, I've extended every possible form of City support to the Awrey investors and Awrey employees to help keep the company viable. (Real property owed was $498,003.55; personal property owed is $242,490.53; and water and sewer owed is $720,726.94). [June 15, 2012 letter (Exhibit 11)].

Similarly, as Awrey's President and CEO wrote on February 20, 2013:

> After a long year, I am glad that it worked for the City. I will always remember what all of you [the City] did for the families at Awrey over the past 2 years. You generated $15 million in payroll and $50 million in purchases. You should be proud of the choices you made. [February 20, 2013 email (Exhibit 12)].

Plaintiff, however, was neither involved with nor consulted in connection with these agreements, and Plaintiff only found out about them in mid-2012 when Defendant's agreements with Awrey failed. Had it known of these agreements, Plaintiff would have objected since Defendant would likely look to Plaintiff for payment if the agreements with Awrey failed, which they did.

D. Defendant Files Suit Against Awrey And The Bank.

In Summer 2012 Awrey went out of business. Shortly thereafter, on September 28, 2012, Defendant filed a lawsuit in the Circuit Court against Awrey and the Bank, captioned *City of Livonia v Awrey Bakeries, LLC*, docket number 12-012867-CK ("Defendant's Lawsuit") (Exhibit 9). Among other things, in

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[2] Defendant argues that the Subordination Agreement has nothing to do with this lawsuit. Defendant is wrong. For example, the Subordination Agreement evidences that Defendant and Awrey were engaged in secret activities to the detriment of Plaintiff. In fact, these discussion were so "secret" that Defendant later sued Awrey claiming that the Subordination Agreement was not authorized by Defendant and was illegal. In addition, by subordinating its debts to Awrey's Bank, Defendant could no longer collect payment from Awrey for the Unpaid Water Charges through a collection action. In effect, and unbeknownst to Plaintiff, the Defendant viewed and treated Plaintiff as a guarantor if its agreements with Awrey failed.

Defendant's Lawsuit Defendant sought to invalidate the very Subordination Agreement it had entered into, claiming for the first time that it was now an illegal agreement. Defendant filed Defendant's Lawsuit to try to void the Subordination Agreement and collect the Unpaid Water Charges (as well as other unpaid personal property taxes) from Awrey. As Awrey wrote, Defendant sought to renege on the Subordination Agreement because Defendant now viewed those deals as unfavorable:

> More than one year after signing the Subordination Agreement and upon learning that Awrey's financial troubles have worsened, the City no longer desired to be bound by its contractual commitment to subordinate certain tax liens. The City agreed to the subordination to induce the Bank to provide financial support to Awrey, a longstanding and important employer in the City of Livonia. The City cannot, however, simply dispose of its contractual obligations now that it views its prior deal as being unfavorable.
>
> The City entered into the Subordination Agreement to help preserve Awrey as a prominent local employer and an important source of tax revenue.... At the time, the City viewed the Subordination Agreement as an appropriate and necessary arrangement, supporting Awrey's efforts to revitalize itself, which of course helped preserve revenue in a sluggish economy. [Awrey's January 18, 2013 Brief, at 2 (Exhibit 13)].

On February 18, 2013, Defendant, Awrey, and the Bank entered into a confidential Settlement Agreement, whereby Defendant was paid $453,000 (Exhibit 14). Adding insult to injury to Plaintiff, Defendant apparently did not even credit any of that payment against the Unpaid Water Charges.

E. Awrey Files For Bankruptcy.

On November 19, 2013 Awrey filed for Chapter 7 bankruptcy liquidation in Delaware Bankruptcy Court, Case No 13-13062-CSS. On March 21, 2014 Awrey's bankruptcy was closed and Awrey ceased to exist.

F. The City Improperly Asserts Water Liens Against The Subject Property.

In addition to having had the right to collect against Awrey for the Unpaid Water Charges (like filing a collection action against Awrey (*see, e.g.* MCL 123.166)), Michigan law also provides Defendant with a unique remedy which can make unpaid water and sewer charges also liens against the real estate where

the water was used even though the owner of the real estate (here, Plaintiff) did not actually use the water. To invoke this special remedy, however, there are a number of stringent legal requirements that Defendant must follow and certain limitations. In addition, the time period to enforce such water liens is limited. *See* MCL 123.162 (water liens are not "enforceable for more than 3 years after [the lien] becomes effective). Failure to follow the legal requirements and timely enforce the water liens results in the liens being invalid and unenforceable.

In December 2012, and for the first time, Defendant purported to place the Unpaid Water Charges on the ad valorem tax roll as water liens on the Subject Property (plus penalties and interest, for a total over $900,000 (the Water Liens)). **It is undisputed that Defendant did not follow the Ordinance and did not timely certify the Unpaid Water Charges each year; nor did Defendant follow the Ordinance and timely place the Unpaid Water Charges on the tax roll each year.** Thereafter, in January 2013, Defendant sent, for the first time, Plaintiff a tax bill which included the Water Liens.

G. This Lawsuit.

Plaintiff timely objected to Defendant placing the Water Liens on the Subject Property. The Water Liens are invalid and not enforceable because Defendant failed to follow Defendant's Ordinance and timely and properly perfect the Water Liens each year. As a result, on April 11, 2013 Plaintiff timely filed this lawsuit (Exhibit 15).[3] In this lawsuit Plaintiff sought a ruling that the Water Liens were invalid and unenforceable on Plaintiff's tax bill for the Subject Property.

H. The Circuit Court Order.

Just as discovery was starting in this matter, Defendant filed a motion for summary disposition seeking to summarily dismiss the Complaint and requesting sanctions. The Circuit Court stayed discovery

[3] Plaintiff's Complaint contains six counts: an action to invalidate the Water Liens (Count I); estoppel/waiver (Count II); unjust enrichment/quantum meruit (Count III); breach of the ordinance (Count IV); tortious interference (Count V); and civil conspiracy (Count VI) (Exhibit 15).

and held several hearings on Defendant's summary motion over an approximately nine month period. Among other things, at those hearings Defendant never disputed that Defendant had violated the Ordinance and not properly and timely placed the Water Liens on the property tax roll as required by the Ordinance:

> **The Circuit Court:** The statute also says every March you're going to stick it on the tax bill so that landlords like [Plaintiff] are aware that...our tenant is $700,000 in arrears and we might get stuck with that, we got to do something about it.
>
> **Defendant's Attorney:** Well remember, Your Honor, in the first place the 1939 Act doesn't say that, immediate lien does not have any provision like that.
>
> **The Circuit Court:** Yeah, it's your own city ordinance that says it.
>
> **Defendant's Attorney:** Our city ordinance says, following the 1933 Act, that yes, there's a requirement that you roll us the taxes every year, that requirement though is not intended to protect comatose landlords like this. Nothing in the statutes or in the case law that relate to this kind case does anything to protect the comatose landlord. The statute's presume that a landlord will do one of two things. Either the landlord will file one of these tenant responsibility notices and give us notice that they're the ones who are supposed to get the –
>
> **The Circuit Court:** So that's the same ordinance and statute that you didn't abide by that you're saying, well they didn't abide by it, so we should stick it on them.
>
> **Defendant's Attorney:** Not the same, we didn't ... [October 4, 2013 Hearing Tran, at 6-7 (Exhibit 16)].

Defendant further acknowledged that Defendant was trying to keep Awrey in business for the benefit of Defendant's local economy:

> **The Circuit Court:** ....Landlord or the City of Livonia with all the taxes and water, and I forgot about the jobs, they want one of their largest employers booted by the landlord?
>
> **Defendant's Attorney:** No, we don't –
>
> **The Circuit Court:** You guys didn't want that.

> **Defendant's Attorney:** – want our largest employer – Here's the thing, the mayor's trying to do two pretty much contradictory duties to the public already. One is to try to keep the local economy intact and the other is to try to collect everything he can from Awrey. [October 4, 2014 Hearing Tran, 11-12 (Exhibit 16)].

As a result – and based principally on the admissions of Defendant that Defendant had intentionally failed to comply with the Ordinance in connection with the Water Liens – the Circuit Court correctly held that the Water Liens were invalid and unenforceable:

> **The Circuit Court:** As a result of the City's failure to follow the ordinance and properly perfect the water liens the water liens are now invalid and unenforceable against the subject property. **And again the City admits that it didn't follow the ordinance each year. And that somehow the City claims that the City had no obligation to follow its own ordinance, and the City's failure to do so has no effect whatsoever on the City's effort to enforce the water liens. And if this Court were to accept that argument it would render its own ordinance meaningless and a nullity.**
>
> It was clearly and plainly written that in order to perfect the water lien the City each year had to certify timely the unpaid water charges, placed them on the tax roll, the City didn't do, it's unenforceable.
>
> In this instance the City knew that the tenant was using the water, there was no doubt about that. The City never was dealing with, from the documents here and the affidavits, with the landlord. The agreements as to the water were always with the tenant and until things went south, Awrey's out of business, and we've got close to a million dollar water bill with penalties and interest do they come knocking on the door of the landlord, surprise, here it is, it's on the March tax roll or whatever the 2012 tax roll, pay up. And by the way, we didn't follow our own ordinance. [April 24, 2014 Hearing Tran, at 11-12 (Exhibit 17); bold added].

Defendant then appealed the Circuit Court Order to the Michigan Court of Appeals.

I. The COA Opinion.

On December 22, 2015 the Court of Appeals issued the COA Opinion reversing the Circuit Court Order. The COA Opinion held that it was basically irrelevant that Defendant had failed to comply with the Ordinance because, taken collectively, water liens are indestructible under the 1933 Revenue Bond Act,

MCL 141.101, *et seq.* (the "Revenue Bond Act") and the 1939 Municipal Water Lien Act, MCL 123.161 *et seq.* (the "1939 Act"):

> Importantly, a municipality is granted discretion in the manner of collection, as in accordance with MCL 123.163, such liens 'may be enforced...in the manner prescribed in the charter of the municipality, by the general laws of the state providing for the enforcement of tax liens, *or* by an ordinance duly passed by the governing body of the municipality.' This is reinforced through the language of MCL 123.166, which provides that a municipality has the authority to discontinue water service when arrearages exist 'or may institute an action for the collection of the same in any court of competent jurisdiction.' Of significance is the further provision within MCL 123.166, indicating that collection efforts 'shall not invalidate or waive the lien upon the premises.' In addition, 1939 PA 178 must be 'constructed as an additional grant of power ...or as a validating act....' Such language serves to obviate the trial court's determination that defendant's failure to strictly conform to its own ordinance serves to negate the lien mandated by the statutory scheme of 1939 PA 178. [COA Opinion, at 4; citations omitted].

The COA Opinion – invoking concepts like *pari materia*[4] – held that somehow despite its use of the word "shall," the more "reasoned and fair" result is that the Ordinance requirements were actually not mandatory but instead discretionary, and Defendant was not really obligated to comply with them based on the whole statutory "scheme" relating to water liens as set forth in the 1939 Act and the Revenue Bond Act:

> Reviewing the interplay of the [Ordinance] and MCL 141.121(3), indicates that MCL 141.121(3) provides the discretion to treat water service arrearages as a lien, with the option to place charges that are more than six months in delinquency on a municipality's tax rolls. Although MCL 141.121(3) provides for '[t]he time and manner of certification' along with 'details in respect to the collection of the charges and the enforcement of lien' to be 'prescribed by the ordinance adopted by the governing body,' there is no language mandating an immediate placement on the tax rolls. Similarly, defendant's ordinance, while requiring yearly certification of delinquencies implies a level of discretion in the certification because it does not require immediate certification of a delinquency of six months but rather certification of delinquencies that have existed for 'six (6) months or more.' In other words, MCL 141.121(3) provides discretion in the creation of liens for delinquent water usage charges with the minimal delinquency

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[4] *Pari materia* is the legal concept of reading separate but related statutes, together. *See* COA Opinion, at 7.

> criteria to initiate collection efforts, which the local ordinance provides the methodology and authority to be followed once a determination has been made to pursue enforcement or collection efforts.
>
> Such an interpretation provides a more reasoned and fair result and is in accordance with the rules of statutory construction. [COA Opinion, at 6; citations omitted].

The COA Opinion, however, then contradicted itself, summarily holding that even though at all relevant times Defendant had actual knowledge that Awrey – not Plaintiff – was the user of the water and responsible for payment, Plaintiff was still not entitled to the protections granted to landlords from water charges incurred by its tenants under MCL 141.121(3) because in order to invoke that protection the statute says Plaintiff "shall" file an affidavit, "shall" means mandatory, and Plaintiff did not do so:

> It is undisputed that plaintiff did not provide an affidavit in accordance with MCL 123.165 or provide written notification as required in MCL 141.121(3). Plaintiff cannot escape the mandatory nature of the requirements delineated in MCL 123.165 through use of the word "shall." [COA Opinion, at 9].

Finally, the COA Opinion reversed the Circuit Court Order's denial of summary disposition on Plaintiff's other claims, concluding that even though discovery had not been completed, including taking the depositions of Defendant's representatives, those claims were still somehow not viable. *See* COA Opinion, at 9.

For the reasons stated herein, the COA Opinion is wrong and should be summarily reversed and the Circuit Court Order reinstated.

III. ARGUMENT

A. Standard Of Review.

This Court's standard of review of statutory interpretation is de novo. *See e.g. Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008) ("Questions of statutory interpretation are also reviewed de novo.") (citation omitted); *Michigan Dept of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008) ("Questions of constitutional interpretation and statutory interpretation are questions of law reviewed de

novo by this Court.") (citations omitted). "If an administrative agency or trial court interprets a statute, such a determination is a question of law subject to review de novo." *Mericka v Dept of Community Health*, 283 Mich App 29; 770 NW2d 24 (2009).

B. *This Court Should Grant Leave Because This Case Presents Substantial Questions As To The Interpretation Of Legislative Acts, Raises Issues Of Significant Public Interest, And Involves Legal Principles Of Major Significance To The State's Jurisprudence.*

The word "shall" is contained in countless statutes, ordinances and rules in this State. Its use by the Legislature and other rule making bodies, including Defendant, is supposed to be clear and unambiguous: it is meant to convey a mandatory requirement that must be followed. The Michigan Courts had long acknowledged this basic meaning of the word "shall." *See, e.g. Roberts,* 466 Mich at 65 ("the phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action.") (citation omitted); *Fradco, Inc*, 495 Mich at 114 (the word "shall" indicates "a mandatory and imperative directive"); *Ross*, 255 Mich App at 58 (2003) (the word "shall" indicates a mandatory duty); and *Kenefick*, 284 Mich App at 657 ("The word 'shall' indicates mandatory conduct") (citation omitted).

The COA Opinion, however, alters that long-established definition of the word "shall." Under the COA Opinion the word "shall" can mean "must" or it can be discretionary and mean "may," depending on whom it is being applied to. Here, a statute (MCL 123.165) and an ordinance (the Ordinance) both used the exact same word of "shall" to convey mandatory requirements. In both cases it is undisputed that the party for whom the mandatory requirement applied (*i.e.*, Plaintiff filing an affidavit under MCL 123.165 and Defendant yearly certifying the unpaid water charges and placing them on the tax rolls under the Ordinance) failed to perform those mandatory requirements. Yet, under the COA Opinion somehow the mandatory "shall" requirements were only mandatory for Plaintiff, and they were discretionary for Defendant. Put another way, based on the COA Opinion the word "shall" means something different depending on whether you are a taxpayer or a government entity. Respectfully, such a holding is wrong, it ignores basic rules of statutory interpretation in favor of outcome-oriented court legislation, and violates

taxpayers' rights to both due process of the law and equal protection.

In short, the COA Opinion has made a mess of what was a well-established and straightforward meaning of the word "shall" which had been uniformly applied by Michigan courts for decades. Whether the COA Opinion can simply switch back and forth between different meanings of the word "shall" in order to create inconsistent interpretations of statutes to manufacture desired outcomes, is certainly an important issue to this State's jurisprudence. It is hard to envision a case more deserving of this Court's granting leave.

C. The COA Opinion Incorrectly Held That The Water Liens Can Be Placed On Plaintiff's Tax Bill.

The COA Opinion basically concludes that Defendant's power to collect on water liens is limitless. That conclusion is wrong. In order for a water lien to be enforceable on a tax bill Defendant must, among other things, timely perfect and enforce such water liens pursuant to Michigan law, including without limitation complying with Defendant's Ordinance and Michigan law. Here, the Water Liens cannot be placed on Plaintiff's tax bill because Defendant did not properly and timely perfect and enforce the Water Liens. As a result, the Circuit Court Order correctly granted Plaintiff summary disposition on its declaratory judgment action (Count I).

1. Rules of statutory interpretation.

It is well established that courts must apply clear and unambiguous statutory language as it is written, and cannot read requirements and exceptions into a statute that the municipality did not put there. For example, in *People v Stone*, 463 Mich 558, 562-563; 621 NW2d 702 (2001), the Michigan Supreme Court held:

> [T]he primary goal of statutory construction is to give effect to the Legislature's intent. People v Morey, 461 Mich 325, 330; 603 NW2d 250 (1999). To ascertain that intent, this Court begins with the statute's language. When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed. *Id*....This Court may

> consult dictionaries to discern the meaning of statutorily undefined terms. *Id*. However, recourse to dictionary definitions is unnecessary when the Legislature's intent can be determined from reading the statute itself. Renown Stove Co v Unemployment Compensation Comm, 328 Mich 436, 440; 44 NW2d 1 (1950).

See also Empire Iron Min Partnership v Orhanen, 455 Mich 410, 423; 565 NW2d 844 (1997) ("We cannot read requirements into a statute that the Legislature did not put there.").

The rules of statutory construction also apply to the interpretation of municipal ordinances. *See Piasecki v City of Hamtramck*, 249 Mich App 37, fn3; 640 NW2d 885 (2001).

2. The Water Liens are invalid because they violate the Ordinance.

The Ordinance plainly mandates that in order to perfect and enforce a water lien against the Subject Property Defendant **must** both certify by March **each year** the unpaid water charges and then timely place them on the tax roll (which, if done properly, would result in those unpaid charges being placed each year on the owner's yearly tax bills):

> Charges for water service constitute a lien on the property served, and during March of each year the person or agency charged with the management of the system ***shall*** certify any such charges which as of March 1st of that year have been delinquent six (6) months or more to the city assessor, who ***shall*** enter the same upon the city tax roll of that year against the premises to which such service shall have been rendered; and said charges ***shall*** be collected and said lien ***shall*** be enforced in the same manner as provided in respect to taxes assessed upon such roll. [Ordinance 13.08.350(A); emphasis added (Exhibit 3)].

Here, the word "shall" is repeatedly used in the Ordinance. Under the definitions section of Defendant's Ordinance (Section 1.04.020, item 16) (Exhibit 18), "'[s]hall' means imperative or mandatory."

Similarly, as discussed above, under Michigan law, the word "shall" means that Defendant **must** certify the charges by March 1st of each year; and after certification, Defendant's assessor **must** enter these charges on the tax roll.

A principal policy reason the Ordinance mandates such yearly certification and timely placement by Defendant on the tax roll, is to prevent exactly what has happened in this case, *i.e.*, to prevent the accruing

of years' worth of unpaid water bills without the property owner's knowledge. Importantly, Awrey – not Plaintiff – incurred the Unpaid Water Charges without Plaintiff's knowledge and with duplicity by Defendant. By mandating that Defendant, each year, certify and place such water liens on the tax roll, the current property owner is put on timely notice of the deficiencies because the charge is then placed each year on the summer tax bill. As a result, the landlord can take the necessary steps to protect itself. As the Circuit Court correctly stated:

> **The Circuit Court:** I don't think the City has contested that that procedure was not followed both to the letter, nor to the spirit.
>
> I didn't write the ordinance, the ordinance said shall, shall means shall, must, mandatory. And if we want to get into the policy reason behind it it's to prevent exactly what happened here, to prevent the accruing of years and hundreds and tens and hundreds of thousands of dollars worth of unpaid water bills without the property owner's knowledge. [April 24, 2014 Hearing Tran, at 10 (Exhibit 17)].

Defendant, however, intentionally violated the Ordinance and failed to certify timely the Unpaid Water Charges on the tax rolls each year. This is not some sort of inadvertent mistake by Defendant which results in a hyper-technical violation of the Ordinance by Defendant as the COA Opinion seems to suggest. Quite the opposite, Defendant intentionally did not timely certify and place the Water Liens on the tax roll each year (and, thus Water Liens did not appear on Plaintiff's yearly tax bills) because Defendant concluded that it was in Defendant's best interest not to do so in order to keep Awrey in business, to prevent Plaintiff from likely evicting Awrey, and to comply with the secret contractual agreements Defendant had made with Awrey and its Bank (*i.e.*, the Subordination Agreement). Defendant knowingly and intentionally took these affirmative actions, including not following the Ordinance, for Defendant's benefit, and to the detriment of Plaintiff because Plaintiff relied on those false yearly tax bills. Put another way, Defendant knowingly and intentionally violated the Ordinance because it was trying to keep Awrey in

business. It cannot be disputed that had Defendant simply followed its Ordinance and done what it was legally required to do, this entire "mess" would likely never have happened.

Regardless, as a result of Defendant's failure to follow the Ordinance and properly perfect the Water Liens, the Circuit Court Order correctly held that the Water Liens had to be removed from Plaintiff's tax bill. It is well established in Michigan law that failure to properly perfect a lien results in an otherwise permitted lien being rendered invalid and unenforceable. *See, e.g., Northern Concrete Pipe, Inc v Sinacola*, 461 Mich 316; 603 NW2d 257 (1999) (lien invalidated where lien holder failed to comply with 90-day filing time limit); *Jenks v Daniel*, 304 Mich 239; 7 NW2d 286 (1943) (material and labor lien invalidated because it was not made in good faith); *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002) (construction lien was invalid because plaintiff was not licensed); *In re Dean Monagin, Inc*, 18 Mich App 171; 170 NW2d 924 (1969) (lien invalidated because it was not properly and timely perfected); *Stock Bldg Supply, LLC v Parsley Homes of Mazucheat Harbor, LLC*, 291 Mich App 403, 410; 804 NW2d 898 (2011) (lien for plumbing work invalid because it was not timely filed); *Church & Church, Inc v A-1 Carpentry*, 281 Mich App 330; 766 NW2d 30 (2008) (plaintiff could not recover lien from the Homeowner Construction Lien Recover Fund because plaintiff did not timely make a claim); *Vorrath v Garrelts*, 49 Mich App 142, 145 and 147; 211 NW2d 536 (1973) (failure to comply with the lien statute and not file a sworn statement can prevent the attachment of an otherwise valid lien: "A lien is something apart from the cause of action and destruction of a lien has no effect on the underlying cause of action except to render it at least partially unenforceable if the defendant is insolvent") (citation omitted).

Here, just like any other untimely filed lien, the Circuit Court Order correctly held that the Water Liens could not be placed on the tax roll because it is undisputed that they were not properly perfected pursuant to Michigan law, including the Ordinance. Of course, Defendant could have recovered its monies

from Awrey; and Defendant pursued such an opportunity in connection with Defendant's Lawsuit and received certain monies from Awrey and its Bank.

The COA Opinion, however, reversed the Circuit Court Order and, instead, granted Defendant unwarranted and improper special treatment by exempting Defendant from the mandatory requirements of its very own Ordinance. This type of legislating by the COA Opinion is exactly what courts are not permitted to do. *See, e.g. Roberts*, 466 Mich at 66 ("The role of the judiciary is not to engage in legislation.") (citation omitted); *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002) ("Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute.").

Defendant and government entities in general should be held to the same legal standards as taxpayers, nothing more, nothing less. Importantly, Michigan courts have repeatedly held that a taxpayer's failure to perform timely mandatory requirements under a statute can bar a taxpayer from relief that it would otherwise be entitled to. For example, in the just decided case of *Packaging Corp of America v Dep of Treasury*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 16, 2014 (Docket No 317708) (Exhibit 19), the Court of Appeals denied a taxpayer a tax credit that the taxpayer was unquestionably entitled to on the basis that the relevant statute said that the taxpayer "shall" complete and deliver a personal property statement by a specific date, and this Court concluded that the taxpayer had failed to timely do so. Just like the taxpayer in the *Packaging Corp* case, Defendant's failure to follow a mandatory statute constitutes a fatal defect that Defendant cannot overcome. *See also e.g. Creative industries Group, Inc v Department of Treasury*, 187 Mich App 270; 466 NW2d 311 (1990) (Court of Appeals upheld denial of application for exemption certificate because taxpayer filed the application more than six months after construction of the property had commenced in violation of the relevant statute); *Walgreen Co v Macomb Twp*, 280 Mich App 58, 64-65; 760 NW2d 594 (2008) (Court of Appeals held that a

commercial leaseholder who does not present written authorization of the property owner may not protest its tax assessments at the board of review even though the leaseholder was a party-in-interest and responsible for paying the taxes); *Biltmore Wineman, LLC v Township of Northville*, unpublished opinion per curiam of the Michigan Court of Appeals, issued January 24, 2003 (Docket No 233901) (Court of Appeals upheld removal of exempt status of property because taxpayer failed to file timely petition because taxpayer did not get notice as a result of failing to file a transfer affidavit) (Exhibit 20).

Likewise, the same rules should be applied here to remove the Water Liens from the tax rolls.

3. Defendant Could Have Written Its Ordinance Differently.

Under the COA Opinion, Defendant is permitted to foreclose on real property under the Michigan General Property Tax Act, MCL 211.1 *et seq*. (the "GPTA") just because there are unpaid water charges, and not because Defendant actually complied with the law. This is wrong, and there is no legitimate legal support for such a result. Taxpayers like Plaintiff are entitled to the protections of the Ordinance and statutes. Under the unambiguous language of the GPTA, only delinquent taxes (plus fees and interest) which are already on the ad valorem tax rolls can form the basis for a foreclosure action. See MCL 211.78a(1) ("...all property returned for delinquent taxes, and upon which taxes, interest, penalties and fees remain unpaid....is subject to forfeiture, foreclosure and sale for the enforcement and collection of the delinquent taxes..."). The GPTA makes no mention of a municipality being able to foreclose on real property based on unpaid water charges which are not on the tax rolls.

Therefore, before Defendant can foreclose on Plaintiff's property or any other real property under the GPTA based on unpaid water charges, those unpaid water charges first have to be placed onto Defendant's ad valorem tax rolls and treated as property taxes.[5] The Michigan Legislature, however, did

[5] Under the GPTA, water liens first have to be basically "converted" into taxes and placed on the ad valorem tax rolls before they can then be deemed delinquent and the basis of a foreclosure action.

not provide any such express written procedures or authority setting forth the time and manner for placing the unpaid water liens onto the ad valorem tax rolls.

Instead, the Legislature delegated this job, leaving it up to the individual municipalities to create their own ordinances and procedures for the time and manner for placing unpaid water liens onto the ad valorem tax rolls. For example, under the 1939 Act Defendant's ability to put an unpaid water charge on a tax bill is based on the Ordinance:

> The lien created by this act may be enforced by a municipality in the manner prescribed in the charter of the municipality, by the general laws of the state providing for the enforcement of tax liens, **or by an ordinance duly passed by the governing body of the municipality**. [MCL 123.163; bold added].

Likewise, the Revenue Bond Act also relies on municipalities to establish their own procedures and requirements for placing unpaid water charges on a tax bill:

> Charges for services furnished to a premises may be a lien on the premises, and those charges delinquent for 6 months or more may be certified annually to the proper tax assessing officer or agency who shall enter the lien on the next tax roll against the premises to which the services shall have been rendered, and the charges shall be collected and the lien shall be enforced in the same manner as provided for the collection of taxes. **The time and manner of the certification and other details in respect to the collection of the charges and the enforcement of the lien shall be prescribed by the ordinance adopted by the governing body of the public corporation**. [MCL 141.121(3); bold added].

This is critical and a point ignored by the COA Opinion, because, if a municipality chooses not to create such express procedures for placing unpaid water liens onto its ad valorem tax rolls, then there would be no other express legal basis whatsoever for that municipality later to bring a foreclosure action under the GPTA based on unpaid water liens. *See* MCL 211.78a.

Once an unpaid water lien is properly placed on the ad valorem tax roll those unpaid water charges automatically convert into unpaid taxes.

As a result, different municipalities in Michigan have passed their own ordinances – which often contain very different and unique requirements – for placing unpaid water liens onto their respective ad valorem tax rolls. Many of those other procedures passed by other municipalities are either less restrictive or more restrictive than Defendant's Ordinance. For example, and in no way exhaustive:

(1) For the City of Ann Arbor, from "time to time" the Chief Financial Officer reports to the City Council a list of all unpaid charges for water services which have been unpaid for at least six months. The City Council then determines how much is due, and assesses that amount as a tax and places it on the tax rolls. *See* Ann Arbor Code of Ordinances, §2.72 (Exhibit 21);

(2) For the City of Kalamazoo, the Township Treasurer may, at the Treasurer's discretion, certify **at any time** an unpaid water charge which is delinquent for more than six months to the tax assessing officer. The assessing officer then has to place it on the next tax roll. *See* City of Kalamazoo Charter And General Ordinances, at §159.004.IV(D) (Exhibit 22); and

(3) For Traverse City, all unpaid water charges which, upon April 1 of each year, are unpaid for three months or more shall be reported by the City Manager to the City Commission in the first meeting in April. The City Commission shall then order the notice of the unpaid amount published in a newspaper. If the amount is still unpaid by April 30, then the amount shall be transferred to the City's tax roll assessed against the property upon which the water was used, to be collected in the same manner as the lien created by City taxes on the tax roll. *See* Traverse City General Ordinances, §1044.17(d) (Exhibit 23).

Further, some municipalities even decided not to add water liens to their tax rolls at all, probably to avoid the significant requirements that the GPTA mandates during the foreclosure process (*e.g.*, having to

wait two years in order to foreclose on the property). For example, for the City of Detroit there is no specific authority in its ordinance allowing the City to place water liens onto the tax rolls. Instead, the City has an entirely different and expedited collection system whereby the City, through the board of water commissioners, is permitted to enforce a water lien by, at any time, simply selling the real property at public auction after providing certain required notices. *See* City of Detroit Ordinances, at §56-2-44 (Exhibit 24).[6]

Here, Defendant certainly could have passed an ordinance (and may consider doing so in the future) giving Defendant more flexibility than the subject Ordinance. Cities such as Kalamazoo, Detroit, and Grand Rapids have done so. And if Defendant had one of those less restrictive ordinances in place, then this likely would be a different case. Defendant, however, chose not to do so. Instead, Defendant's Ordinance contains unambiguous mandatory and specific timing requirements which Defendant **must** follow in order to be allowed to place a water lien onto its tax rolls. Defendant's taxpayers (through Defendant's City Council) apparently demanded more transparencies and protections against Defendant foreclosing on real property under the GPTA based on unpaid water charges than other municipalities – which was certainly their right to do.

The COA Opinion, however, simply ignored the Ordinance and Michigan law making local municipalities responsible for setting the time and manner for placing unpaid water charges on the tax rolls. Instead, the COA Opinion relieved Defendant of the Ordinance's mandatory requirements and ignored Defendant's City Council (who passed the Ordinance), and substituted one of the less demanding and discretionary ordinances that certain other cities have adopted which do not contain such mandatory time

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[6] The City of Detroit Water and Sewerage Department also filed an amicus brief in support of Defendant at the Court of Appeals. In addition to being wrong (for all of the reasons set forth in this brief and Plaintiff's original brief on appeal), the City of Detroit has no real interest in this case or its outcome. Importantly, the City of Detroit's ordinances provide for an entirely different procedure for foreclosing on real property (with rights of redemption) based on unpaid water liens than Defendant's Ordinance. In fact, the City of Detroit's ordinance (section 56-2-41) specifically notes that water liens do not have priority over tax liens (Exhibit 24). Thus, whatever happens in this case has absolutely no bearing on the City of Detroit's ability to collect on unpaid water liens within its jurisdiction.

requirements as the Ordinance. Respectfully, there is no legal authority for what the COA Opinion has done and the COA Opinion has rendered the Ordinance and its requirements meaningless and a nullity in order to protect Defendant from its own mistakes and improper behavior. *See, e.g. Complete Auto & Truck Parts, Inc v Secretary of State*, 264 Mich App 655, 661; 692 NW2d 847 (2004) ("Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether it is made with 'mathematical nicety.' A court is not empowered to override the Legislature on these bases. Redress for an unwise law or bad policy is properly sought with the Legislature.") (citations omitted).

If Defendant (or any other municipality) does not want to be subject to the more restrictive requirements of the Ordinance, then it is certainly entitled to pass less restrictive requirements and remove the word "shall" from the Ordinance, just as was done by other cities throughout the State of Michigan. The Michigan Legislature left this choice solely up to the municipality. However, whatever ordinance a municipality ultimately decides to adopt, it certainly is lawful for a court to hold that municipality to the requirements set forth in that ordinance – which is all the Circuit Court did in this case while the COA Opinion ignored the law.

Here, the Ordinance unambiguously applies to all water and sewer liens, regardless of whether those liens arose under the 1939 Act, the Revenue Bond Act, both, or some other statutory or common law authority. Defendant has not identified language (nor could it because none exists) limiting the Ordinance and its requirements to just liens which arise under the Revenue Bond Act. Cobbling together bits and pieces from the 1939 Act and the Revenue Bond Act, out of context, as the COA Opinion has done, does not change the unambiguous mandatory language of the Ordinance.[7]

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[7] In addition, the well-developed maxim in Michigan law that "[t]ax laws are to be construed liberally in favor of the taxpayer" would further govern the resolution in favor of Plaintiff. *Ready Power Co*, 336 Mich 519, 525; 58 NW2d 904 (1953) citing *Sibley Lumber Co v Department of Revenue*, 311 Mich 654, 660 (1945); *City of Detroit v Phillip*, 313 Mich 211, 216; 20 NW2d 868 (1945); and *Consumers Power Co v Corporation & Securities Commission,* 326 Mich 643, 648; 40 NW2d 756 (1950). *See also Ford Motor Co v*

4. Defendant is legally required to follow the Ordinance.

The COA Opinion's conclusion that Defendant is not actually obligated to follow the Ordinance is wrong and, if allowed to stand, renders the Ordinance meaningless and a nullity. Under Michigan law, the Ordinance – including the word "shall" – cannot be read to be meaningless. *See also Robinson v City of Lansing*, 486 Mich 1; 782 NW2d 171 (2010) ("statutory provisions should not be construed in a manner that renders language within those provisions meaningless"); *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 70; 748 NW2d 524 (2008) ("[A]n interpretation that renders language meaningless must be avoided."). Importantly, the Ordinance repeatedly uses the word "shall" – which means Defendant was required each year to certify timely the water charges and place them on the tax roll. Michigan law does not allow for Defendant to read out of the Ordinance words like "shall" because "[t]o do so would violate the cardinal rule . . . that *every phrase, clause and word must be given effect*." *Reinhold Group, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued April 13, 2004, at *4 (Docket No. 248025) (emphasis added) (Exhibit 25).

The COA Opinion's conclusion that Defendant is not required to follow the Ordinance because it is somehow discretionary for Defendant, is without legal merit. Again, the language of the Ordinance, including the use of the word "shall," contradicts the COA Opinion's conclusion. The act of timely certifying and placing the Water Liens on the tax roll under the Ordinance is a ministerial function, and one which Defendant does not have discretion to deviate from – even if the benefits to Defendant outweigh performing such legal obligations (e.g., lending financial aid to a struggling water customer like Awrey who provides

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State Tax Commission, 400 Mich 499; 255 NW2d 608 (1977); *Bechtel v Dep't of Treasury*, 128 Mich App 324; 340 NW2d 297 (1983). Any ambiguous or doubtful language must be strictly construed against the taxing authority. "There is no doubt that this Court has followed the general rule of construction that revenue laws containing doubtful language are to be strictly construed against the taxing authority." *Borden, Inc v Dep't of Treasury*, 391 Mich 495, 514; 218 NW2d 667 (1974), citing *Hart v Dep't of Revenue*, 333 Mich 248, 252 (1952); *Ecorse Screw Machine Products Co*, 378 Mich at 418.

extensive financial benefit to Defendant).[8] *See, e.g. Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 679-80; 780 NW2d 753 (2010) (assessor is not empowered to review or alter certified tax rates or to refuse to spread a certified tax on the tax roll); *Williams v Mayor, etc, of City of Detroit*, 2 Mich 560; 1853 WL 3638 (1953) ("The making of an assessment roll and apportioning a tax under the ordinances is a ministerial duty, and the confirmation of the assessment partakes more of the character of a judicial than of a legislative act. We must, therefore regard the ordinances relating to assessments, as binding and obligatory upon the corporation as upon the individual citizens."); *Board of State Tax Comm'rs v Quinn*, 125 Mich 128, 131; 84 NW 1 (1900) ("[I]t is not the duty of an [assessing] officer to omit a statutory duty because of an opinion that the action of his superiors has not conformed to law. He has merely to do his duty as prescribed by law, leaving the regularity of the action of others to be determined by the courts."). Here, Defendant intentionally did not perform its legal duty in connection with each year timely certifying and placing the Water Liens on the tax roll.

5. Plaintiff's failure to file an affidavit under MCL 123.165 is irrelevant.

The COA Opinion concluded that Plaintiff was not entitled to relief from the Water Liens because Plaintiff failed to file an affidavit under MCL 123.165. The purpose of MCL 123.165 is to prevent Defendant from putting liens on a landlord's property for unpaid water charges when the Defendant knows that the tenant is the one using the water and responsible for payment.

It is not disputed that Plaintiff did not file such an affidavit during the relevant time period. However, Plaintiff's failure to file such an affidavit is irrelevant in this case for several reasons. First, Plaintiff's failure

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[8] Defendant has argued that Defendant should be empowered to ignore the Ordinance so that Defendant can work with water customers, like Awrey, who are having financial hardships. However, the law does not provide Defendant with such unrestricted power. Thus, Defendant's sole remedy for its dissatisfaction with the Ordinance is to seek a change from Defendant's legislative body, not the courts. *See, e.g. Complete Auto & Truck Parts, Inc*, 264 Mich App at 661 ("Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether it is made with 'mathematical nicety.' A court is not empowered to override the Legislature on these bases. Redress for an unwise law or bad policy is properly sought with the Legislature.") (citations omitted).

to file an affidavit does not excuse Defendant's legal obligation to follow the Ordinance, nor does it somehow "magically" make the Water Liens now valid. Regardless of whether Plaintiff filed an affidavit with the water board, the Water Liens still cannot be placed on the tax roll unless Defendant follows the Ordinance and, each year, timely certifies the unpaid water charges and places them on the tax roll (which then becomes included on the yearly tax bills). Here, Defendant admits that it did not follow the Ordinance and, therefore, the Water Liens should now be removed from Plaintiff's tax bill.

Second, Plaintiff is still entitled to the protection of MCL 123.165 because Defendant had actual notice of the Lease, and Defendant and the water board knew that it was Awrey – not Plaintiff – who was responsible for paying the Unpaid Water Bills. The purpose of MCL 123.165 is so that a governmental entity like Defendant has notice that the landlord is not responsible for the water. Here, Defendant and the water board entered into the various agreements with Awrey, including the Letter of Understanding and the Subordination Agreement, because they knew that it was Awrey – not Plaintiff – who was ultimately responsible for the Unpaid Water Charges. *See* Defendant's Lawsuit Complaint at ¶8 (Exhibit 9). As the Circuit Court correctly held, at all relevant times Defendant knew that Awrey, not Plaintiff, was the one responsible for paying the Unpaid Water Charges:

> In this instance the City knew that the tenant was using the water, there was no doubt about that. The City never was dealing with, from the documents here and the affidavits, with the landlord. The agreements as to the water were always with the tenant and until things went south, Awrey's out of business, and we've got close to a million dollar water bill with penalties and interest do they come knocking on the door of the landlord, surprise, here it is, it's on the March tax roll or whatever the 2012 tax roll, pay up. [April 24, 2014 Hearing Tran, at 11-12 (Exhibit 17)].

Therefore, because Defendant had **actual notice** of the Lease and entered into the Subordination Agreement, Defendant has not been materially prejudiced by Plaintiff not filing the affidavit. Therefore, Plaintiff is still entitled to the protection of MCL 123.165. *See, e.g. City of Livonia v Department of Social Services*, 123 Mich App 1, 18; 333 NW2d 151 (1983) (failure to provide statutory notice to City was waived

where City had actual notice of proposed license and failure to comply with literal terms of the statutory notice provisions did not materially prejudice the City). In fact, Defendant's improper actions with the Unpaid Water Charges and Subordination Agreement further supports this interpretation.

Third, if the COA Opinion is correct and the mandatory deadlines in the Ordinance (which Defendant readily admits it violated) are a nullity, meaningless and not enforceable under principles of equity – which they are not – then equity should also be applied to give Plaintiff the protections under MCL 123.165 even though Plaintiff did not meet the procedural requirement of filing the affidavit. Importantly, the purpose of filing the affidavit under MCL 123.165 was to let Defendant know that the tenant (Awrey), not the landlord (Plaintiff), was responsible under the Lease to pay the water charges. Here, it is undisputed that at all relevant times Defendant had actual knowledge that Awrey – not Plaintiff – was responsible for the unpaid water bills under the Lease. Thus, regardless of whether the affidavit was filed, the intent of MCL 123.165 was readily met; Defendant is not prejudiced because Defendant knew at all times that Awrey was solely responsible for payment; and applying principles of equity, the filing of the affidavit was, therefore, not mandatory (and Defendant is now estopped from claiming otherwise) and Plaintiff is entitled to the protections of MCL 123.165.

The COA Opinion does not treat the parties the same, and if it was invoking novel interpretations of the word "shall" to allow Defendant to avoid the unambiguous language of the Ordinance, then the COA Opinion should also have applied the same definition/meaning of the word "shall" in order to give Plaintiff the protections of MCL 123.165 in order to avoid the harsh, unfair, and absurd consequence of making Plaintiff responsible for Awrey's Unpaid Water Charges under these circumstances.

Defendant should not be allowed to have it both ways. If the COA Opinion is correct – which it is not – and the word "shall" is not mandatory and the unambiguous language of the Ordinance is a nullity and meaningless, then so too is the alleged strict procedural requirement of filing an affidavit under MCL

123.165 because it cannot be disputed that Defendant had actual knowledge that Awrey – not Plaintiff – was responsible for the Unpaid Water Charges. Simply put, "what's now good for the goose is good for the gander." *See, e.g. Porter v Landis*, 329 Mich 76, 81; 44 NW2d 877 (1950) ("[a]mong the rules which have become axiomatic is one that a party must be consistent and not contradictory in the positions which he takes. In the language of Lord Kenyon he must not 'blow hot and cold' at the same time").

D. *The COA Opinion Improperly Reversed The Circuit Court Order's Denial Of Defendant's Motion For Summary Disposition On Counts II-VI.*

Discovery in this matter had just begun when Defendant filed, and the Circuit Court ruled on, the motion for summary disposition. Among other things, at that time Plaintiff had sought to take the depositions of several of Defendant's representatives. That discovery never happened, and the Circuit Court Order did not rule on the remaining counts because "(i) those remaining counts are now moot; and (ii) Defendant's Motion as to Counts II through VI of Plaintiff's Complaint is premature because the parties have not completed discovery." *See* Circuit Court Order, at 3 (Exhibit 2).

The COA Opinion held that the Circuit Court Order was wrong, and the Circuit Court should have also granted Defendant summary disposition as a matter of law as to Counts II-VI, even though there were numerous issues of disputed material facts in connection with those claims and discovery had just started. The COA Opinion is wrong, and this is an independent reason for the COA Opinion to be summarily rejected by this Court.

1. *Defendant's motion for summary disposition was premature.*

The COA Opinion granted Defendant summary disposition based on, among other things, its holding that the factual history was not disputed. It is impossible from the COA Opinion to ascertain which facts the COA Opinion is now claiming are not disputed because there is no recitation of those facts in the COA Opinion. Regardless, as evidenced by the record, the COA Opinion is wrong and the facts in this case have been vigorously disputed by the parties.

The Circuit Court Order correctly denied Defendant's motion for summary disposition on those remaining Counts II-VI because there were disputed issues of material fact and discovery had not been completed. Defendant brought its motion for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10). "In analyzing a motion for summary disposition pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *See Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (citation omitted). Similarly, a motion based on MCR 2.116(C)(8) is only appropriate if the "opposing party has failed to state a claim on which relief can be granted." "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the movant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *See Maiden*, 461 Mich at 119.

Defendant's motion for summary disposition under MCR 2.116(C)(10) can only be granted if Defendant demonstrates that no genuine issue of material fact exists and Defendant is entitled to judgment as a matter of law. *McGrath v Allstate Ins Co*, 290 Mich App 434, 438 n1; 802 NW2d 619 (2010) (citation omitted). "The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt." *Id.* at 30-31. Summary disposition under MCR 2.116(C)(10) is "generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *See Liporato Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). Under Michigan law, if a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party need only assert that a dispute does indeed exist and "support that allegation by some independent evidence." *See Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

Here, the Circuit Court Order correctly held Defendant's motion for summary disposition as to Counts II-VI was premature because, among other reasons, discovery had not even really started. *See* June 6, 2014 Hearing Tran, at 21-22 (Exhibit 26)]. For example, **Defendant refused to produce witnesses for deposition** in order to avoid the disclosure of facts detrimental to Defendant; and Plaintiff had a motion to compel still pending with the Circuit Court , and at the time the Circuit Court Order was entered Plaintiff had a pending motion to compel those depositions (Exhibits 5 and 27). There is near certainty here that further discovery, including the depositions of Defendant personnel, would have allowed Plaintiff to present further support for its arguments, including but not limited to, the fact that Defendant had engaged in improper conduct. *See CMI Int'l, Inc. v Intermet Int'l Corp*, 251 Mich App 125, 135; 649 NW2d 808 (2002) (summary disposition is premature if there is a fair chance that further discovery will allow the party opposing the motion to present sufficient support for its arguments). Plaintiff, like any other litigant, is entitled to conduct discovery to resolve these issues of disputed material fact.

2. Defendant's motion for summary disposition was without legal or factual merit.

In addition to being premature, the COA Opinion's grant of summary disposition as to Counts II-VI of Plaintiff's Complaint also was wrong because Plaintiff asserted viable claims against Defendant. The COA Opinion prematurely dismissed those claims without giving Plaintiff the opportunity to finish discovery, including depositions, and to amend its pleadings, if necessary, as Plaintiff is entitled to do as a matter of right under MCR 2.118. As set forth below, Plaintiff properly pled the necessary elements of its claims and, therefore, Plaintiff was legally entitled to pursue those claims:

(a) Count II is a valid and properly pled claim for estoppel and waiver.

In the alternative, Plaintiff properly pled in Count II a claim for estoppel and waiver. Count II asserts that Defendant is estopped from enforcing the Water Liens against the Subject Property because of the Defendant's improper actions.[9]

Here, all of the elements of estoppel were properly pled and met. By failing to follow its own Ordinance and certify each year the Unpaid Water Charges and place them on the tax roll (and, instead, signing the Subordination Agreement and other agreements with Awrey delaying and frustrating Defendant's ability to collect against Awrey and sending Plaintiff each year false tax bills), Defendant induced and caused Plaintiff to believe that Awrey had been paying the water bills and there were no unpaid water charges accruing. Plaintiff justifiably relied on Defendant's inaction (otherwise, it would have demanded Awrey pay the Unpaid Water Charges). Plaintiff was prejudiced because Defendant now, retroactively, has improperly asserted the Water Liens against the Subject Property for Unpaid Water Charges going as far back as 2009. Finally, Defendant was unjustly enriched by keeping Plaintiff ignorant of Awrey's delinquency because, among other things, it allowed Awrey to maintain its operations for a longer period of time, which provided significant financial benefit (both direct and indirect) to Defendant and the local economy.

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[9] The equitable doctrine of estoppel "rests upon broad principles of justice." *City of Holland v Manish Enter*, 174 Mich App 509, 514; 436 NW2d 398 (1989) (citations omitted). The elements are: (1) a party by representation, admissions, or silence, intentionally or negligently induces a party to believe facts; (2) the other party justifiably relies and acts or fails to act because of this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. [Id.] An estoppel "arises only when a party acts to induce another to believe that certain facts exist and the other rightfully relies and acts (or fails to act) on such a belief to his detriment if the former is allowed to deny such fact . . . ." *Parker v Twp of West Bloomfield*, 60 Mich App 583, 591; 231 NW2d 424 (1975).

(b) Count III is a valid and properly pled claim for unjust enrichment/quantum meruit.

Again, in the alternative, Count III of the Complaint pleads a valid claim against Defendant for unjust enrichment. Under Michigan law, the elements of a claim for unjust enrichment are "(1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party." *See Karaus v Bank of New York Mellon*, 300 Mich App 9, 14; 831 NW2d 897 (2012) (citation omitted).

Here, Defendant, among other things, improperly subordinated the Unpaid Water Charges to the Bank, diverted monies to the Bank which Awrey otherwise would have used to pay the Unpaid Water Charges, and failed to comply with the Ordinance. As a result, Defendant received the "benefit" of substantial financial benefits that came with Awrey remaining in business. Furthermore, the "inequity" is that Defendant has retained those substantial financial benefits and, at the same time, now also seeks to improperly impose the Water Liens on the Subject Property. Defendant should not be entitled to keep the substantial financial benefits it received as a result of intentionally deceiving Plaintiff.

(c) Count IV is a valid and properly pled claim for breach of the Ordinance.

For the reasons previously set forth above regarding the Ordinance, and incorporated herein, Defendant intentionally violated the Ordinance to Plaintiff's detriment, and Plaintiff is entitled to relief.

(d) Counts V is a valid and properly pled claim for tortious interference.

In the alternative, Plaintiff also properly pled a valid tortious interference claim[10] against

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[10] The elements of tortious interference with a business relationship are the (1) existence of a valid business relationship; (2) knowledge of the relationship on the part of the defendant; (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship; and (4) resultant damage to the plaintiff. *See Mino v Clio School District*, 250 Mich App 60; 661 NW2d 586 (2003) (internal citation omitted) (emphasis added). With respect to element (3), the conduct must be "both intentional and improper." *See Weitting v McFeeters*, 104 Mich App 188, 197; 304 NW2d 525 (Mich App 1981) (emphasis added).

Defendant.[11] First, Plaintiff executed the Lease with Awrey. Under the Lease, Awrey – not Plaintiff – was responsible for paying the water bills. Second, Defendant **knew** about the Lease between Plaintiff and Awrey. Third, Defendant intentionally induced Awrey to breach the Lease by, among other things, entering into secret agreements allowing Awrey to continue to not pay the water charges without seeking Plaintiff's consent, and then subordinating the Unpaid Water Charges to the Bank's security interest in Awrey's personal property (making it impossible for Defendant to collect from Awrey on the Unpaid Water Bills). As a result of Defendant's tortious acts, Awrey funds were diverted to the Bank and other operations that Awrey should have been using to pay the Unpaid Water Bills, as required by the Lease. Fourth, Plaintiff suffered damages as a result because Defendant now seeks to collect Awrey's Unpaid Water Charges from Plaintiff.

It has never really been disputed that Plaintiff had pled a valid tortious interference claim against the Defendant. Instead, Defendant claimed that the tort claims should be dismissed pursuant to MCR 2.116(C)(7) because Defendant has governmental immunity from its tortious acts.

Defendant is wrong, and immunity does not apply in this case because Defendant admits it was acting outside the scope of its governmental function. Under the GTLA, Defendant is only immune from tort liability "if [it] is engaged in the exercise or discharged of a governmental function." See MCL 691.1407(1). "Governmental function" is defined as an activity "that is expressly or implied mandated or authorized by constitute, statute, local charter or ordinance or other law." See MCL 691.1401(b). However, the statute

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[11] The COA Opinion found that Plaintiff did not properly plead in avoidance of the Government Tort Liability Act ("GTLA"). Although Plaintiff disagrees, if true, then Plaintiff is entitled to leave to amend its Complaint so that it could make this correction. See MCR 2.118(A)(2) ("Leave shall be freely given when justice so requires."); MCR 2.116(I)(5) ("If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified."). Here, there has been no prejudice to Defendant given, among other things, that discovery in this matter had just begun.

provides six exceptions to immunity, one of which is the proprietary exception. See MCL 691.1413. Under this exception. *See Coleman v Kootsilas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

Here, Defendant's tortious conduct of interfering with Plaintiff's Lease, including entering into the Subordination Agreement and intentionally not following the Ordinance, meets the proprietary exception because it was a proprietary act by Defendant, i.e., was not normally supported by taxes and fees and was conducted by Defendant to produce a profit. As a result, Defendant is not immune from liability for its tortious actions. Importantly, Defendant already admitted in Defendant's Lawsuit against Awrey that entering into the Subordination Agreement and not collecting the Unpaid Water Bills was not a proper governmental function, and Defendant alleged that the Subordination Agreement violated Michigan law – which was, in part, why Defendant sought to invalidate the Subordination Agreement in Defendant's Lawsuit. Defendant engaged in these improper actions for its own profit, to the detriment of Plaintiff, resulting in damage to the Subject Property (Plaintiff's property). Thus, by Defendant's own admissions, Defendant is not entitled to immunity in connection with those improper Defendant actions.

(e) Count VI is a valid and properly pled claim for civil conspiracy.

Plaintiff's Complaint (Paragraphs 30-32) properly pled a valid civil conspiracy claim,[12] including that Defendant, Awrey and the Bank unlawfully conspired to divert Awrey's monies to the Bank, to the detriment of Plaintiff. Among other things, Plaintiff's Complaint specifically identifies Awrey and the Bank as co-conspirators.[13] In addition, and as already discussed above, Plaintiff properly pled the elements of a valid

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[12] Under Michigan law the elements of a civil conspiracy are "(1) a concerted action (2) by a combination of two or more persons (3) to accomplish an unlawful purpose (4) or a lawful purpose by unlawful means." *See Mays v Three Rivers Rubber Corp*, 135 Mich App 42, 48; 352 NW2d 339 (1984) (citation omitted).

[13] Michigan law does not require Plaintiff to name all such co-conspirators as defendants in this lawsuit. *See e.g. Brown v Brown*, 338 Mich 492, 504; 61 NW2d 656 (1953) (citations omitted) ("A joint action may be maintained against the conspirators for the damages caused by their wrongful acts, but all the conspirators need not be joined; an action may be maintained against but one."); *McDonald v Hall*, 203

underlying tort claim. *See, e.g., EMC Mortgage Corp v Am Fellowship Mut Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued Nov 20, 2012, at *5 (Docket No 298518) ("A claim of civil conspiracy must be based on an underlying actionable tort.") (Exhibit 28).

IV. CONCLUSION

Plaintiff respectfully requests that this Court issue an order (1) granting Plaintiff's application for leave to appeal, (2) vacating and reversing the COA Opinion, (3) affirming the Circuit Court Order, (4) awarding Plaintiff costs including attorneys' fees, and (5) awarding Plaintiff any other relief this Court deems necessary and just.

Respectfully submitted,

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Mich 431, 439; 170 NW 68 (1918) ("It is not essential that all parties claimed to be participants in a conspiracy be made parties to the action....").